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No. 96-1441

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

WEST AMERICAN INSURANCE COMPANY,
Petitioner,
v.
MARK R. FREEMAN,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Four

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR

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1.

INTRODUCTION

Petitioner, West American Insurance Company ("West American"), respectfully submits this reply pursuant to Rule 15.6, Rules of the Supreme Court of the United States, limited to three points raised in the opposition brief for respondent, Mark R. Freeman ("Freeman").

This reply can be extremely short because Freeman's brief ignores many of West American's most significant contentions. For example —

- that certiorari jurisdiction is established without question when the highest state court has ruled on the federal question presented to this Court (see Petition for Cert. at 2);

- that conflict and uncertainty persist among the nation's federal and state courts as to the applicability of this Court's *Noerr-Pennington* jurisprudence to state tort damage awards implicating the Petition Clause (see Petition at 12-14);

- that a Petition Clause violation is more likely and more serious in the instant case because California has exposed only one class of citizens to immediate harassment and punishment for exercising their petition right, while deferring complaints about any other citizen's exercise of that right to a post-finality malicious prosecution action (Petition at 14-16);

- that it is insidious to suggest that "depublished" California Court of Appeal decisions approving serious federal constitutional violations somehow do not count as such for certiorari purposes even though the violation itself is left undisturbed and even tacitly approved by the appellate disposition (Petition at 15-16 and n. 3); and

- that this Court has consistently rejected the ordinary appellate deference, such as the alternative grounds rule, when the record does not rule out the possibility that the petitioner was penalized for conduct protected by the Constitution. (Petition at 22-23).

There is no need to repeat West American's original discussion of those and other points that Freeman ignores. Rather, this reply focuses on three of the main points he does make in an attempt to avert review in this Court.

2.

RESPONDENT MISCITES AUTHORITY IN CONTESTING THIS COURT'S JURISDICTION

While conceding that certiorari jurisdiction would be established by an actual ruling below on the issues presented in West American's petition, Freeman constructs an elaborate but frivolous challenge to the predicate for such jurisdiction here.

First, citing *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928), Freeman contends that a state appellate court "must be assumed" to have based its decision on state rather than federal constitutional grounds when both grounds were presented. (Opp. at 1) Then, quoting from *New York Central & H.R. Co. v. New York*, 186 U.S. 269 (1902), Freeman reasons that "it was not 'made to appear that some provision of the Federal . . . Constitution was relied upon' by the Court of Appeal." (Opp. at 2)

Bryant and *New York Central* afford no support whatsoever for Freeman's position. In fact, *Bryant* flatly contradicts it. Just as here, the opinion of the highest state court in *Bryant* "d[id] not mention the Constitution of the State or the Fourteenth Amendment [in upholding the validity of a statute], but d[id] state that the relator was asserting the 'unconstitutionality' of the statute." 278 U.S. at 68. Directly contrary to Freeman's portrayal, *Bryant* held that certiorari jurisdiction was not even "debatable," *id* at 70, because, in context, the highest state court plainly rejected federal *and* state constitutional challenges that had been raised earlier in the case.

New York Central is equally unhelpful to Freeman. There, this Court rejected certiorari jurisdiction primarily because the petitioners had cited no particular federal constitutional provision in their only documented brief in the court below. Nor could they point to any decision by that

court on a federal issue. Indeed, this Court observed that the lower court had "made no allusion to such a question . . . ." 186 U.S. at 273.

Here, by contrast, West American relied explicitly and prominently on the federal Petition Clause. Here, the highest state court expressly referred to and rejected West American's contentions based on "the constitutional right of access to the courts." (App. 24) And here, too, the context — strikingly similar to the context in *Bryant* — leaves no room for doubt that the highest state court intended to decide and *necessarily* decided the federal Petition Clause issue along with the state constitutional issue. *Bryant* requires no more than that to establish certiorari jurisdiction.

Because Freeman relies so heavily on his jurisdictional challenge, West American concludes this discussion by noting a more recent decision, *Street v. New York*, 394 U.S. 576 (1969), which dramatically confirms the proper reading of *Bryant*. In *Street*, too, the highest state court's opinion did not mention the constitutionality of a statutory provision banning any "words" that "defy . . . or cast contempt upon any flag of the United States." Nevertheless, relying on *Bryant*, this Court upheld its certiorari jurisdiction to decide the constitutionality of the quoted provision. The constitutional issue was squarely presented by the record; it had been raised in petitioner's briefs; and thus it was "necessarily decided" by the opinion below, 394 U.S. at 581, even without any express reference.[1]

In short, Freeman's primary contention in opposition to a grant of certiorari in this case is frivolous on its face.

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[1] The balance of the *Street* opinion is also notable here for its emphatic rejection of an alternative grounds affirmance where, as here, the record did not rule out the possibility that petitioner was penalized for constitutionally protected conduct.

3.

RESPONDENT MISCITES AUTHORITY ON THE COUNTERCLAIM ISSUE

Similarly, Freeman cites *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), as authority supporting his use of a tort cross-complaint in the same case to attack the bona fides of West American and its principal action. (Opp. at 10-11) Freeman states that *TXO* is "remarkably similar" in that respect to the instant case. (Opp. at 10)

TXO is anything but similar. There, the principal action "was decided [and rejected] on the basis of the parties' written submissions," 509 U.S. 449, and "[t]he counterclaim for slander of title was subsequently tried to a jury." *Id.* at 450. It was only the outcome of the counterclaim that this Court reviewed. The propriety of the counterclaim as such was never an issue in *TXO* — and precisely because, unlike here, the principal action had gone forward on the merits without the harassment and prejudice of a tort counterclaim attacking its *bona fides*. Nor had the State of West Virginia permitted such a counterclaim against only one class of citizens exercising their rights under the Petition Clause.

It is one thing for Freeman to ignore West American's entire analysis of the counterclaim issue in light of *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), and *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983). (See Petition for Cert. at 17-18) It is another thing to miscite *TXO* so materially.

4.

RESPONDENT MISCHARACTERIZES PETITIONER'S *BMW* ARGUMENT BELOW

Finally, Freeman states the West American's supplemental briefs on the *BMW* case in the California Supreme Court "did not even address its reprehensible conduct and the decisional authority that such conduct warranted substantial punishment." (Opp. at 7) Freeman's statement is belied by the introduction appended to the Petition for Certiorari at App. 65-67. There is no need to submit West American's entire Supplemental Brief on *BMW* or respond any further on this point.

CONCLUSION

For the foregoing reasons, and those stated more fully in the petition, the writ of certiorari should be granted in this important case.

Respectfully submitted,

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